

ELDON BRINKERHOFF

IBLA 76-110

Decided April 21, 1976

Appeal from the decision (Utah 110-75-1(SC)) of Administrative Law Judge Robert W. Mesch finding appellant guilty of grazing trespasses, fining him for damages caused, and reducing his active use under his grazing permit by 20 percent for 2 years.

Affirmed.

1.     Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Trespass -- Trespass: Generally -- Words and Phrases

The term "grazing trespass" as used in the context of the Federal Range Code refers to the grazing of livestock on federal land without an appropriate license or permit or in violation of the terms and conditions of a license or permit, and not to any other special

meaning ascribed under other laws and circumstances if inconsistent with this usage.

2. Administrative Practice -- Administrative Procedure: Generally -- Attorneys -- Constitutional Law -- Grazing Permits and Licenses: Generally

Although a respondent in a grazing license trespass hearing brought by the Bureau of Land Management has the right to be represented and aided by legal counsel, the Department has no duty or responsibility under the Constitution or the Administrative Procedure Act to provide such counsel for him.

3. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Trespass -- Trespass: Generally

Where a permittee was found to have committed repeated grazing trespasses, a fine of twice the commercial rate for foraging such animals was warranted in accordance with the regulations.

4. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Cancellation or Reduction -- Grazing Permits and Licenses: Trespass -- Trespass: Generally

Where a grazing trespass is willful, grossly negligent, or repeated, disciplinary action in the form of suspension, reduction, or revocation, or denial of renewal of a grazing license or permit may be warranted. The regulatory factors, together with any mitigating circumstances, should be considered to determine the extent of the reduction or other disciplinary action.

5. Administrative Procedure: Administrative Law Judges -- Rules of Practice: Appeals: Generally

Upon appeal from a decision of an Administrative Law Judge, the Board of Land Appeals may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance.

6. Grazing Permits and Licenses: Trespass -- Trespass: Generally

In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

7. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Cancellation or Reduction -- Grazing Permits and Licenses: Trespass

Where the record of a grazing trespass case does not support a finding of mitigating or extenuating circumstances which would warrant changing a 20 percent reduction of a grazing permittee's active use qualifications for two grazing seasons, an Administrative Law Judge's order of such a reduction will be upheld.

APPEARANCES: Eldon Brinkerhoff, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Eldon Brinkerhoff appeals from Administrative Law Judge Robert W. Mesch's decision of June 23, 1975 (Utah 110-75-1(SC)), which reduced appellant's grazing privileges on Federal range by 20 percent for 2 years and assessed damages at \$210, for repeated trespasses committed during the 1973 and 1974 grazing seasons in violation of the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. §§ 315, 315a, and 315b (1970), and implementing regulations, 43 CFR 4112.3-1(a) and (b).

The record reveals that in 1973 and 1974, the Bureau of Land Management (BLM), found appellant's cattle in an area of the Federal range not authorized for grazing by his license; 4 violations were found in 1973 with a total of 88 cattle, and 3 violations in 1974, totaling 17 cattle. Furthermore, in 1974, appellant's cattle were found grazing on Federal range without BLM ear tags as required by appellant's license; 13 violations occurred, totaling 119 cattle. In consideration of the Bureau's evidence and appellant's admissions, Judge Mesch found appellant guilty of 20 separate grazing trespasses.

[1] Judge Mesch defined a "grazing trespass" as occurring "when livestock graze on Federal lands without an appropriate license or permit or in violation of the terms and conditions of a license or permit." All regulations pertaining to grazing in grazing districts established pursuant to the Taylor Grazing Act are referred to collectively as the "Federal Range Code." The term "grazing trespass" must be understood in the context of the Federal Range Code, especially those regulations prescribing sanctions by way of reductions in grazing privileges and/or damages for violations of the Code (see 43 CFR 9239.3-2 discussed infra). The Judge's definition succinctly condenses the import of the regulations and the usage of the term "grazing trespass" thereunder. That term has the meaning stated by the Judge and not any other special meaning which might be ascribed under other laws and circumstances if inconsistent with this usage.

[2] Appellant filed his statement of reasons incorporated in his Notice of Appeal on July 24, 1975. Before considering his arguments relating to the sanctions imposed, we shall discuss several preliminary matters concerning the hearing. Appellant specifically contends that the Violation and Hearing Notice sent by the BLM notified him of two hearings, and that he had understood that to mean the Bureau would meet with him the day of the hearing to discuss the problem. Appellant contends further that:

- a. I had no one to represent me and they would not let my son speak, so we were not prepared for the court action as it was.
- b. Many of the things that were brought out I was not prepared to give a proper statement on.

The Bureau's Violation and Hearing Notice was personally served on the appellant February 6, 1975. That Notice makes no reference, in any form, to two hearings. It stated:

YOU ARE HEREBY CITED TO APPEAR before an Administrative Law Judge of the Department of the Interior on Tuesday, March 11, 1975, at 9:00 a.m., in the Kane County Courthouse, Kanab, Utah, to show cause why your license or base property qualifications should not be reduced, revoked, or renewal thereof denied, and satisfaction of damages made.

As to the contention that appellant had no one to represent him, and that he was unprepared to make proper statements on certain matters, the Administrative Procedure Act, 5 U.S.C. § 555(b) (1970), provides:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. \* \* \*

The testimony concerning this issue is as follows:

JUDGE MESCH: Mr. Brinkerhoff, are you representing yourself?

MR. BRINKERHOFF: Yes.

JUDGE MESCH: You do not have an attorney to represent you?

MR. BRINKERHOFF: No.

JUDGE MESCH: Do you have any question about the proceedings?

MR. BRINKERHOFF: Yes. Well, just that I'm not guilty of all these trespasses.

(Tr. 4).

Appellant had more than adequate notice of the hearing and its subject matter. Furthermore, he could have filed for a postponement of the hearing within the time allotted by the regulations, showing good cause and proper diligence, in order to retain counsel and/or prepare for the hearing. 43 CFR 4.452-3 and 4.472(b). The fact that appellant had no attorney at the hearing affords him no greater rights on appeal than if he had had an attorney. Judge Mesch carefully counseled him on his rights to object to evidence, to testify, and, otherwise, conducted the hearing in a very proper manner being mindful that appellant had no attorney. We see no violation of any of appellant's rights. As this Board has stated:

\* \* \* Due process requirements are satisfied by proper notice and an opportunity for a hearing. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 (1963); United States v. Sullivan, 9 IBLA 278 (1973); United States v. Haas, A-30654 (February 16, 1967). While appellant has the right to be represented by legal counsel, he has no right to have counsel provided nor is the Department obligated by the Constitution or the statute or otherwise to furnish counsel for a party to an administrative hearing. Hullom v. Burrows, 266 F.2d 547 (6th Cir. 1959), cert. denied, 361 U.S. 919 (1959); United States v. Fenton, A-30621 (January 9, 1967).

United States v. Jenkins, 11 IBLA 18, 22-23 (1973). These principles also apply to proceedings under section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970). 1/

[3] We turn now to appellant's other contentions which, basically, consist of statements or explanations of his grazing trespasses. Appellant does not articulate the relief he desires in making this appeal, but the matters he discusses go to the issue of whether mitigating circumstances existed which might justify a sanction less onerous than that ordered by the Judge.

Sanctions which may be imposed upon a holder of grazing privileges who commits grazing trespasses are a fine for damages and

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1/ In regard to appellant's son, nowhere in the record does it appear that he was representing his father. Furthermore, the record reveals that appellant's son was allowed to speak any time he so requested during the course of the hearing.

disciplinary action affecting his grazing privileges. Both of these actions are involved in this case, and both pertain to a finding that appellant violated regulations 43 CFR 41.12.3-1(a) and (b), which prohibit:

(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.

(b) Grazing livestock upon or driving livestock across the Federal range, including stock driveway, in violation of the terms of a license or a permit, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated, or in any other manner.

Damages for grazing trespasses are computed according to 43 CFR 9239.3-2(c)(2), which requires the payment of \$4 per animal unit month (AUM) or twice the commercial rate if such amount is higher, where the trespass is found to be clearly willful, grossly negligent, or repeated.

Judge Mesch found appellant had committed "repeated" trespasses and fined him twice the commercial rate (\$5 times 2, equaled \$10 per AUM). We affirm this finding, for the record reveals that appellant had been charged with six previous trespasses during 1968,

1970, and 1971, with fines ranging from \$4 to \$48. 2/ Moreover, the trespasses committed during the 1973 and 1974 grazing seasons constitute repeated trespasses in and of themselves. Appellant offered no evidence to contradict the Government's case that the commercial rate was \$5 per AUM. Furthermore, nothing he has presented in this case establishes that the findings of the Judge, on the times and places the cattle were in trespass and his finding the trespasses were repeated, are incorrect.

[4] Disciplinary action is provided by the regulations in the form of suspension, reduction, revocation, or denial of renewal of a grazing license or permit when a clearly established violation of the terms or conditions of the license or permit occurs, or for a violation of the Taylor Grazing Act or any of the pertinent provisions of the regulations. 43 CFR 9239.3-2. To warrant disciplinary action, the violation must be willful, grossly negligent or repeated. 43 CFR 9239.3-2(e)(1). Such action is necessary, for:

[i]n no other way can the Department fulfill its obligation to protect the Federal range and to provide for the orderly use and management of that range. This disciplinary control is entirely apart from the imposition of a fine as punishment for willful violation of the provisions of the act

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2/ The record shows these fines were paid and the trespasses are considered closed (Ex. 5).

or the rules and regulations prescribed by the Secretary. Were it otherwise, the Secretary would be completely at the mercy of licensees who could violate the terms of their licenses or permits at their pleasure secure in the knowledge that their only punishment would be the imposition of a fine.

Alton Morrell and Sons, 72 I.D. 100, 109 (1965).

The BLM had recommended a 25 to 30 percent permanent reduction in the appellant's base property qualifications, which Judge Mesch said was "based upon the respondent's repeated trespasses which have created an extensive and continuing problem for the Bureau of Land Management." The Judge, however, found the proper sanction to be a reduction of appellant's active use qualifications by 20 percent for a period of 2 years. In reaching this determination, he stated:

The respondent offered some excuses or justification for the unauthorized grazing. I see no reason, however, to consider the validity of the assertions made by the respondent and rule on the questions of whether the trespasses were clearly willful or grossly negligent. It is clear that the respondent repeatedly trespassed during both the 1973 and 1974 grazing seasons. In addition, evidence was presented, which the respondent did not dispute, showing that he had a record of six previous grazing trespasses between June 1968 and October 1971. \* \* \*

The major question in this appeal is whether the circumstances mentioned by appellant and the evidence of record supports

the Judge's order to reduce appellant's active use qualifications by 20 percent for 2 years. While regulation 43 CFR 9239.3-2(e)(1) permits a reduction for repeated trespasses, the other regulatory factors of willfulness and gross negligence should be considered together with any mitigating circumstances to determine the extent of the reduction or other disciplinary action. Some Departmental decisions illustrate the weighing of all these factors in determining what, if any, disciplinary action should be imposed. For example, where a trespass occurred due to conditions or events beyond the control of the grazing licensee or because of extenuating circumstances, this Board has declined to reduce grazing privileges. State Director for Utah v. Chynoweth Brothers, 17 IBLA 113 (1974); Lawrence F. Bradbury, 2 IBLA 116 (1971).

Where a trespass has only been found to be willful, no reduction has been ordered when the evidence revealed no history of prior trespasses or flagrancy in the charged trespass. Eldon L. Smith, A-30944 (October 15, 1968).

Where trespasses have been found to be repeated, but not willful, and prompt remedial action had been taken by the trespasser, only small reductions have been ordered, such as 10 percent for 1 year. John Gribble, 4 IBLA 134 (1971); Edmund and Jessie Walton, A-31066 (May 27, 1969).

Generally, the Department has limited severe reductions of a licensee's or permittee's grazing privileges to cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass. United States v. Casey, 22 IBLA 358, 369, 82 I.D. 546 (1975); see John E. Walton, 8 IBLA 237 (1972); Eldon L. Smith, 8 IBLA 86 (1972); Alton Morrell and Sons, *supra*; L. W. Roberts, A-29860 (April 23, 1964); Clarence S. Miller, 67 I.D. 145 (1960); Eugene Miller, 67 I.D. 116 (1960); J. Leonard Neal, 66 I.D. 215 (1959). A severe reduction may be a permanent loss of grazing privileges or a temporary loss of significant privileges for a period of years. The present case reduction falls within the middle to somewhat severe range of reductions imposed in the cases cited.

From our review of the record, we find that appellant's trespasses were more than merely repeated, as Judge Mesch held. Those trespasses also fall within the ambit of the term "willful" as used in the grazing trespass cases.

[5] In making this and additional findings, we point out that on appeal from a decision of an Administrative Law Judge,

the Board of Land Appeals has all the powers that the Judge had in making his initial decision. 5 U.S.C. § 557(b) (1970). Therefore, this Board may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance.

[6] Although "willfulness" is basically a subjective standard of the trespasser's intent, it may be proved by objective facts. Thus, in determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by evidence which objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. Lawrence F. Bradbury, supra; Clarence S. Miller, supra.

We find the evidence in this case establishes proof of objective facts sufficient for a finding of willfulness.

The record reveals appellant's trespasses were prolonged, for by his own admissions he was in trespass on more than the 20 days charged in the decision. It is also evident from his testimony and

the record that he made no determined effort to prevent his cattle from wandering onto the Federal range where he was not licensed or was in violation of the terms of his lease (Tr. 99, 100).

The Judge found a total of 21 AUM's trespass established by the evidence. This is a large amount of grazing use in relation to appellant's agreed active use under the Swallow Park Allotment Management Plan executed in 1969 (Ex. 3). Moreover, this number is magnified by evidence that his cattle were in trespass throughout the grazing seasons, beyond the specific days charged.

By evidence of signed certified mail receipts, appellant received numerous trespass notices, including those charged trespasses settled in 1968, 1970, and 1971 (Ex. 5), besides the numerous notices he received from the Bureau during the 1973 and 1974 grazing seasons (Ex. 3). Furthermore, the record reveals that upon his payment of the fines in 1968, 1970 and 1971, appellant received notification of the closing of those cases with a warning included that if the trespasses continued disciplinary action would be taken. The last warning received by appellant on December 24, 1971, stated in part:

\* \* \* Our records show a history of 5 separate trespass actions in the last 18 months period and 6 actions since 1968. If it is necessary to take trespass action against

you again, you will be cited before a hearing examiner [3/] to show cause as to why your Federal grazing privileges should not be cancelled or reduced.

(Ex. 5)

[7] In seeking to justify these trespasses, appellant attempts to shift the responsibility for the trespasses from himself to others. Although Judge Mesch stated he need not rule on the validity of Mr. Brinkerhoff's assertions to excuse or justify the trespasses, we find that the record does not establish such mitigating circumstances as would warrant reduction in the penalty imposed by the Judge.

Appellant contends, with respect to the trespasses occurring in 1973 and 1974, where his cattle were found in the wrong pasture, that the BLM had failed to keep promises it made prior to a 1967 grazing agreement. Appellant claims that prior to 1966 and 1967 he had a permit covering 11 months' grazing season for 82 head of cattle. Further, he states, that BLM, wanting to make a division between him and some other licensees, agreed to reseed certain land if the licensees would cut their grazing season from 11 to 8 months and cut 33 head of cattle, leaving 49 head per month.

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3/ A change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was made by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

He alleges BLM officials promised to make pastures of the reseeded areas, by fencing (supplying both the materials and labor), and had also promised to pipe water into each pasture. Appellant argues he would never have signed for this "split" had the Bureau not stated those facts and started some work on them. In 1973, appellant's cattle were put onto Mud Point Pasture of the Swallow Park Allotment. He alleges that the Bureau had not fixed the fence as agreed in 1967, neither had they reseeded the pasture as promised, nor had they piped water onto Mud Point. He contends that he made trips out every weekend and many times during the week, but because of a lack of water on Mud Point and the fence being partially completed and in poor condition, he was unable to keep his cattle in the allotted pasture. Appellant commented that his co-operator, John L. LeFevre, had the same problem during this season.

There is no support in the record for appellant's assertions that BLM failed to keep any fencing, water pipe construction, or reseeding agreements. We cannot accept these unsupported assertions made on appeal. At most, we will consider such assertions as an offer of evidence to be produced if a new hearing were to be ordered. However, we see no justification for ordering a further hearing in this case because appellant had ample opportunity to present evidence, as we discussed, supra. Furthermore,

there is no indication that further evidence could be produced which would require a different result from that reached by the Judge.

The record reveals that appellant's version of the facts prior to 1966 and of a BLM agreement is very questionable. For example, on June 16, 1969, appellant executed, along with John L. and Leslie LeFevre, an agreement adopting the Swallow Park Allotment Management Plan (Ex. 3). This Plan refers to the contested fence between the Mud Point and Podunk pastures (the pastures in which the cattle trespassed during this period), specifically showing that 2.75 miles had been completed by August 1, 1958, and that the maintenance responsibility was upon the co-operators, which include appellant. Furthermore, on June 16, 1966, appellant had executed an "adjudication grazing adjustment and allotment division agreement." In both this agreement and the 1969 Plan, appellant agreed that the base property qualifications for each operator were only 822 AUM's. His assertion that prior to 1966 and 1967 he had 82 head of cattle for 11 months would have given him active use of 902 AUM's per grazing season. There is no explanation within the record which satisfies how prior active use could have exceeded the base property qualifications. Concerning appellant's allegation the BLM has not reseeded the pastures, the 1969 Plan indicated there had been a reseeding of 2,326 acres. The forage production

increased the allotment's carrying capacity, and thereby increased Mr. Brinkerhoff's active use capacity from 182 AUM's shown in the 1966 plan to 413 AUM's.

Accordingly, appellant's version of the agreement with the BLM, being unsupported by the record and inconsistent with the Allotment Management Plan executed in 1969, cannot support a finding of mitigating or extenuating circumstances relevant to the degree of disciplinary action taken in regard to his trespasses.

Appellant contends, in regard to the ear tag violations committed in 1974, that these were caused by 18 head of his cattle on forest permit lands bordering the BLM allotment. Apparently, these cattle wandered from the forest lands onto the allotment because there was no fence separating the areas. Appellant alleges he tried to get the Bureau and the Forest Service to build a fence or at least provide the materials, but neither would. Appellant's contention is that, "these cattle were paid on government land but on the wrong agency lands."

Appellant's testimony on this matter is revealing. He was asked:

Q. Did you apply for a permit to build a fence across the land?

A. Well, we just told them years ago that there was four or five of us there that would build a fence across there and they turned us down then.

Q. How many years ago has that been?

A. Oh, seven or eight. There was about five of us in there then \* \* \*.

Q. Would that be prior to the time, then, that they adopted the allotment management plan?

A. Yes.

(Tr. 99).

The trespasses with which we are concerned occurred after the allotment management plan was adopted. There is no indication appellant applied to construct a fence or take other corrective actions to prevent the trespasses of the cattle from occurring after that time.

Regardless of the reasons why a fence separating the forest lands from the Swallow Park Allotment had not been constructed, appellant executed the Allotment Management Plan to use Bureau lands for 49 head of cattle for 8 months. This obviously did not include 18 head under a forest permit concerning different lands. Appellant's conduct was unreasonable, for a responsible

user of the Federal range would not have assumed he could continually trespass without violating the written agreement previously executed.

In addition to his contentions concerning BLM, appellant offers a different excuse for one violation. He suggests that the trespass charged on May 25, 1974, was probably caused by someone opening his gates which separate his private land and the Bureau allotment. He asserts in his statement of reasons, that there are four county road gates separating his private lands and the BLM land, and that many times in the past few years he has found those gates opened.

Even assuming these facts concerning the gates and the possibility they could be opened by others, this does not establish that any of appellant's gates had been left open on the particular day in question. Cf. John Gribble, supra at 137. Thus, appellant must be held responsible for this particular trespass.

Therefore, we reject all of appellant's arguments of mitigating or extenuating circumstances, and find the 20 percent reduction of appellant's active use for 2 years is warranted, based upon the frequency and extent of the trespasses involved. We see no basis for overturning the Judge's order imposing the reduction.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

